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Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a
Kentucky Body Corporate, J. C. W. BECKHAM,
THOS. C. MCGREGOR and JAMES W.
CAMMACK, Appellees.

Appeal From the District Court of the United States for
the Eastern District of Kentucky.

BRIEF ON BEHALF OF
PETROLEUM EXPLORATION, APPELLANT.

✓ **EDWARD C. O'REAR and**
✓ **ALLEN PREWITT of**
Frankfort, Kentucky,
✓ **CHAS. N. KIMBALL and**
W. J. BRENNAN of
Sistersville, West Virginia,
Counsel for the Appellant.

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OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,

v.

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Kentucky Body Corporate, J. C. W. BECKHAM,
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CAMMACK, Appellees.

Appeal From the District Court of the United States for
the Eastern District of Kentucky.

BRIEF ON BEHALF OF PETROLEUM EXPLORATION, APPELLANT.

OPINIONS IN COURT BELOW.

The majority and dissenting opinions of the court below are reported in 21 Federal Supplement (Adv. Ops.) 254-259.

As so reported the majority opinion differs slightly from that printed in the record in the following particulars:

(1) Morgan (should be Matthews) v. Rogers, 284 U. S. 521, 526, 76 L. ed. 447, (R. 75) is omitted.

(2) Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 53 L. ed. 796, (R. 76) is omitted.

(3) The final paragraph (R. 77) was somewhat amended after the copy went to the reporter.

STATEMENT AS TO JURISDICTION.

Paragraph 1 of Rule 12 has been complied with. See "STATEMENT AS TO JURISDICTION" heretofore printed.

STATEMENT OF CASE.

The appellant, Petroleum Exploration, is a Maine corporation, duly authorized to hold property and do business as a foreign corporation in Kentucky; the appellees, Public Service Commission of Kentucky (a Kentucky body corporate) and its members, J. C. W. Beckham (Chairman), Thos B. McGregor and James W. Cammack, Jr., are all citizens of Kentucky domiciled in the eastern district thereof. This suit is wholly of a civil nature; arises under the Constitution of the United States; is, as stated, between the citizens of different states; and the matter in controversy exceeds \$3,000.00 (R. 1-2, 42-43, 82).

The appellant is engaged, among other things, in the production of natural gas from private lands in Owsley, Jackson, Clay and Knox counties, Kentucky; and its transmission intra-state through pipe lines across other private lands to the corporate limits of the municipalities of Lexington, Richmond, Irvine, London, Manchester, Somerset, Barbourville and Corbin, at each of which the gas is sold and delivered in bulk to the local gas utility.

The gas is contained in porous portions, sometimes called "pay-streaks" of a subterranean stratum or geological horizon called the Corniferous limestone, in isolated and limited areas, sometimes called "fields", and is produced by means of wells sunk thereto from the surface. The appellant's rights to operate such lands and

produce such gas are vested in it by virtue of grants from the several land owners commonly called oil and gas leases (R. 2, 22, 43, 82-83). In addition to its production from its Knox county leases appellant also purchases in the field small quantities of gas there produced by others (R. 3, 6, 44, 47, 83).

The appellant operates three pipe lines for the transmission of such gas to the points of sale: (1) From its Owsley-Jackson-Clay county leases to the corporate limits of Lexington with branch lines to the corporate limits of Richmond and Irvine, sometimes called its "Lexington Line"; (2) from its Clay county leases to the corporate limits of Somerset with branch lines to the corporate limits of Manchester and London, sometimes called its "Somerset Line"; and (3) from its Knox county leases to the corporate limits of Barbourville and Corbin, sometimes called its "Knox County Lines". These transmission lines are of metal pipe buried in the ground laid through lands pursuant to grants from the land owners of rights-of-way for the purpose (R. 5, 26, 46, 84).

The distributor at Lexington, Richmond and Irvine (and at Ravenna adjacent thereto) is Central Kentucky Natural Gas Company, hereinafter sometimes abbreviated "Central"; at London, Edwards & Eversole Gas Company; and at Barbourville, Corbin, Manchester and Somerset, Peoples Gas Company of Kentucky, hereinafter sometimes abbreviated "Peoples". Formal contracts have been entered into between the appellant and each of such distributors for delivery of gas at each of such municipalities (except Ravenna), save the contract for delivery at Richmond and Irvine was made by the appellant with one D. L. Johnson, who assigned his rights thereunder to East Kentucky Gas Company which, in turn, assigned them to the Central (R. 2-5, 22-

26, 43-45, 83-84). These contracts provide for delivery in the aggregate of approximately a billion cubic feet of gas annually at an aggregate price of about \$350,000.00 and have from nine years upward to run (R. 22-26, 83-84, 86). "1937" stated at page 2 of the record as the date of the Lexington contract is due to an error in the transcript; it should be "1927". See pages 22, 44, 83. All of these contracts were entered into before the Kentucky Utilities Act (Acts 1934, c. 145, effective June 14, 1934, as amended by Acts 1936, c. 92, effective May 16, 1936, appearing as secs. 3952-1 to 3952-61, inclusive, of Carroll's Kentucky Statutes, Annotated, Baldwin's 1936 Revision, hereinafter sometimes abbreviated "Ky. Stat." pertinent sections from which are printed in the appendix).

There is no affiliation and never has been between the appellant and said Central, D. L. Johnson, East Kentucky Gas Company or Edwards & Eversole Gas Company; and appellant's contracts for deliveries to them at Lexington, Richmond, Irvine and London, respectively, were entered into at arm's length (R. 12, 54, 66-68, 83-84).

The appellant owns 25/32nds of the outstanding capital stock of the Peoples and in addition has advanced to it the sum of about \$200,000.00 (R. 11-12, 53, 84).

The contracts with the non-affiliates, the Central, D. L. Johnson (now the Central) and Edwards & Eversole Gas Company state the quantities of gas to be delivered annually thereunder (R. 22-23, 23, 25-26).

All gas delivered pursuant to such contracts at each of the mentioned municipalities is distributed in such municipality by the buyer, except that gas delivered at Irvine is also distributed in Ravenna, adjacent thereto (R. 6, 7, 8, 10, 11, 47, 48, 49, 50, 51, 52, 52-53, 84-85).

The appellant's transmission lines are not interconnected and are independently operated (R. 5, 46); and all gas passing through them is owned exclusively by the appellant and is produced by it save for the small quantities so purchased in the Knox county field (R. 46-47). All gas flowing through the Lexington Line is sold and delivered to non-affiliated buyers, that is, the Central at Lexington, formerly D. L. Johnson, later East Kentucky Gas Company, and now the Central, at Richmond and Irvine. All gas flowing through the Knox County Lines is sold and delivered to appellant's subsidiary, the Peoples, at Barbourville and Corbin. All gas flowing through the Somerset Line is sold to the Peoples at Manchester and Somerset, except ten million cubic feet annually to Edwards & Eversole Gas Company, at London, a non-affiliate (R. 2-5, 43-46, 83-84).

The distribution of gas in each of the municipalities is made pursuant to a franchise for the purpose granted to the utility by the municipality by authority of sec. 164 of the Kentucky Constitution; and as authorized by that section the distribution rates for gas in each municipality were fixed by contract, in reference to the franchise, entered into between the municipality and the local utility or its predecessor prior to the enactment of the Utilities Act. Each of these rate contracts was parcel of the franchise except in the case of Lexington the rates were originally fixed by resolution duly accepted and thereafter made part of the original franchise by amendment. The bill avers and the answer admits that each of these rate contracts was made pursuant to the authority conferred on the municipality by sec. 164 of the Kentucky Constitution; however, the answer qualifies its admissions by further stating that such contracts are subject as a supposed matter of law to "modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and em-

powered by *subsequent* legislation (Italics ours; R. 6-11, 26-39, 47-53, 84-85).

The Utilities Act establishes the Commission and gives it rate regulatory power over certain "utilities" therein defined, *inter alia*, as follows:

"* * * corporations * * * that now or may hereafter own, control, operate or manage * * * (two) any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat and power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *" (Sec. 1 (c); Ky. Stat. 3952-1).

With respect to the rate base the Utilities Act (sec. 4 (f); Ky. Stat. 3952-19) provides:

"* * * In arriving at a valuation of property of any utility as provided in this section the Commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes. * * *"

Sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) expressly undertakes to authorize the Commission to change rates fixed by "any contract, franchise or otherwise, between any municipality and any such utility".

On May 29, 1937 the Commission on its own motion entered an order *ex parte* finding the appellant to be a wholesaler of gas and a "utility" as defined in the Utilities Act and subject to the Commission's jurisdiction; initiating an investigation of the appellant's wholesale

gas prices; setting a public hearing for June 29, 1937, "at which time and place any person interested may appear and present such evidence as may be proper"; and citing the appellant to appear "and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are, in turn, selling the same at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable"; and requiring the appellant to make its "books, accounts, records, correspondence and memoranda * * * available for examination by Commission's representatives". The complete text of the order is quoted in the bill (R. 14-16) and answer (R. 56-58).

It seems obvious from the tenor of the order that it was the object of the Commission not merely to gather information but also to regulate the appellant's wholesale gas prices. If there could be any doubt about the interpretation of the order it is set at rest by the defendants' own construction thereof in their answer (R. 60) as follows:

"Defendants * * * aver that the purpose of the said Commission in instituting and conducting said investigation and proceeding was to determine a fair and reasonable price or rate to be charged by the complainant pursuant to the aforesaid contracts, and to fix said price or rate."

The appellant, conceiving its wholesale gas prices to be not subject to the rate regulatory power of the Commission, and, even though a judicial question, out of deference and an abundance of precaution, appeared on the day mentioned and offered its objections to the Commission's authority in that behalf, in the nature of a plea to its jurisdiction. The plea was summarily overruled and another order entered by the Commission on

or as of that day again finding the appellant to be a "utility" as defined in the Utilities Act and setting the investigation for further hearing on July 29, 1937. The entire text of this order is set out in the bill (R. 16-17) and answer (R. 58-59).

Nothing in the way of traverse or avoidance was filed or testified to in opposition to the appellant's objections to the Commission's jurisdiction and its findings were not based upon any evidence adduced before the Commission but, to use the words of the defendants' answer, "said alleged findings are not findings, but are merely statements made by the Commission based on general information of the members of said Commission" (R. 16, 20, 58, 63, 86).

Within twenty days after the last mentioned order as provided in sec. 6 (d) of the Utilities Act (Ky. Stat. 3952-36) the appellant filed with the Commission its application for rehearing and amended and supplemental objections to the jurisdiction. The objections made are substantially the same as those set forth in the bill of complaint (R. 17-18, 39-40, 59-60, 85).

The complainant is the sole respondent to the investigation, being the Commission's case No. 396 (averred R. 18; not denied R. 60); and the Commission has made no effort to reduce the rates of any of the distributing utilities, but the defendants (R. 61) "aver that any reduction of any of said prices so charged by the complainant to the respective distributors for said gas so sold and delivered would be in the public interest and would accrue to the consuming public through other and *subsequent* regulatory action by the said Commission." (Italics ours).

The appellant's books have never been kept in accordance with the system of accounting prescribed by the Commission for gas utilities. To set them up according to that system would cost \$1,500.00 if the Commis-

sion were to agree to certain adjusting entries. If it were not to agree, the cost of so setting them up from the original sources of the appellant's accounting information would be \$5,000.00 or more (R. 68-69). To employ a firm of competent engineers to appraise the appellant's gas production and transmission properties would cost not less than \$15,000.00. In addition thereto, the appellant would be under the necessity of rendering the engineers such additional service as would cost it not less than \$5,000.00 (R. 70-71). Hence, it would cost the appellant at least \$21,500.00, exclusive of attorney's fees, to comply with the Commission's order. The court below, in its findings of fact, did not undertake to fix the cost of such compliance other than that, exclusive of attorney's fees, the expense to appellant "would be more than \$3,000.00" (R. 86).

Notwithstanding the pendency of the petition for rehearing and the amended and supplemental objections the Commission threatened and intended to proceed with the investigation on the date last set, July 29, 1937 (R. 18, 60, 85).

On July 24, 1937, (R. 1) the appellant filed its bill of complaint and exhibits and gave notice of an application for a restraining order (R. 41).

The bill (R. 1-22) attacks the Commission's authority to regulate appellant's wholesale prices for gas under the due process, equal protection and contract clauses of the United States Constitution (R. 12-13, 18-19). The bill prays for injunctive relief against the investigation insofar as the Commission thereby seeks to regulate the appellant's wholesale gas prices severally in respect of the price fixed by each such contract (R. 20-22).

The court below granted a temporary restraining order on July 28, 1937 (R. 41). The cause came on for hearing on motion for an interlocutory injunction and also by stipulation for final decision on the merits on

August 7, 1937; and by like stipulation the restraining order was continued pending such decision (R. 64-65). For reasons set forth in the majority (R. 73-77) and minority (R. 77-81) opinions, interlocutory and permanent injunctions were denied, the restraining order discharged, and the bill dismissed "for want of jurisdiction in equity herein" (R. 88).

The majority (Circuit Judge Hicks and District Judge Ford) held that, assuming but not deciding the appellant's constitutional objections to be well founded, it could stand by until the Commission had completed its investigation and entered its final determination and sought to enforce the same in the state court by mandamus under sec. 4(b) of the Utilities Act (Ky. Stat. 3952-13) or for the recovery of penalties under sec. 9 thereof (Ky. Stat. 3952-61) and then assert such objections by way of defense, with the ultimate right of appeal to this Court after exhausting its defense in the state courts, which was an adequate remedy at law and ousted the equitable jurisdiction. The minority (District Judge Hamilton) filed a dissent wherein he disagreed with the position of the majority but agreed in the result thereof because, so he held, the appellant's cause had been removed from the jurisdiction of the United States district courts by the Johnson Act (Act of Congress of May 14, 1934, c. 283, sec. 1, 48 Stat. 775, amendatory of sec. 24 of the Judicial Code, U. S. C. tit. 28 and 41 (1)), which he further held was remedial and hence should be liberally construed. The majority opinion does not mention the Johnson Act; and it is plain that they did not deem it applicable. The appellees made no question in the court below of its jurisdiction, either federal or equitable, save the amount in controversy.

SPECIFICATION OF ASSIGNED ERRORS URGED.

We are mindful that, the court below having dismissed the bill of complaint for supposed want of equity jurisdiction without passing on the merits, this Court in all likelihood will not pass thereon (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659); however, the matter being one of appellate policy and not lack of power, we address ourselves to the merits as well as to the jurisdiction and rely upon all assignments of error appearing at pages 93-97 of the printed record, to which reference is made in avoidance of unnecessary repetition. Perhaps, though, it might be helpful to state generally the appellant's main contentions, as follows:

(1) That the court below had jurisdiction, both equitable and federal.

(2) That (a) appellant's Lexington Line wholesale gas deliveries to the Central, a non-affiliate, at Lexington, Richmond and Irvine are private, not "affected with a public interest", and not, therefore, subject to price regulation; and (b) so also are its wholesale gas deliveries from its Somerset Line to Edwards & Eversole Gas Company, a non-affiliate, at London.

(3) That the Central's rates at Lexington, Richmond, Irvine and Ravenna, Edwards & Eversole's rates at London, and the Peoples' rates at Manchester, Somerset, Barbourville and Corbin are fixed by franchise rate contracts, entered into by the respective municipalities (pursuant to specific authority of sec. 164 of the Kentucky Constitution as construed by the Kentucky Court of Appeals) with the distributing utilities, which contracts are within the protection of the contract clause; and that the Commission, therefore, sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) to the contrary notwithstanding, is without lawful authority to alter such

rates; wherefore, the Commission is without lawful authority to regulate appellant's wholesale gas prices to the distributors, as only they and not the public would benefit by any reduction; and such regulation would hence impair the obligation of the wholesale contracts and deprive the appellant of its property without due process.

(4) That even in the absence of the franchise rate contracts at Manchester, Somerset, Barbourville and Corbin the Commission would have authority only to regulate the retail rates of the subsidiary, Peoples, and, in so doing, to fix a reasonable allowance to it as an operating expense for gas delivered by the appellant; but that the Commission can not regulate the manner in which the revenues derived by the Peoples from the public are to be divided between it and the appellant by means of the wholesale contracts, as that is purely an intercorporate matter, for which the Commission can not substitute its judgment.

SUMMARY OF ARGUMENT.

Jurisdiction.

- (a) The amount in controversy exceeds \$3,000.00.
- (b) The court below had equitable jurisdiction.
- (c) The Johnson Act is inapplicable to this suit.

The Merits.

- (a) Appellant's sales to non-affiliates is a private enterprise not affected with a public interest and not subject to regulation.
- (b) The appellant's business of selling gas to non-affiliates is separable from its sales to its subsidiary, the Peoples.

- (c) The Commission is without authority to directly regulate the appellant's contracts with its subsidiary.
 - (d) The franchise rate contracts are valid because:
 - (1) They are within the protection of the contract clause of the United States Constitution, if authorized.
 - (2) They are authorized by the Kentucky Constitution.
 - (3) The Kentucky Constitution has been so construed by the courts of Kentucky and of the United States.
 - (4) It has been so construed by the General Assembly of Kentucky.
 - (5) The validity of such contracts is unaffected by sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) and the *obiter dicta* in reference thereto.
 - (6) A judicial decision construing a statute, under compulsion thereof, is part of the statute and a "law" as used in the contract clause.
 - (e) The attempted regulation of the appellant's business deprives it of its property without due process of law.
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ARGUMENT.**JURISDICTION****Amount in Controversy.**

The bill avers (R. 2) and the answer denies (R. 43), both generally, that the amount in controversy exceeds \$3,000.00. The court found the amount to exceed that sum (R. 82) and the defendants excepted (R. 88). However, the bill further avers (R. 2-5) and exhibits (R. 22-26) and the answer admits (R. 43-46) contracts with nine years upward to run for the sale of approximately a billion cubic feet of gas annually at an approximate aggregate price of \$350,000.00; and the court so found (R. 86); and the defendants did not except. Reduction of even a cent per 1,000 cubic feet would result in an annual loss to the appellant of \$10,000.00.

An answer cannot admit the facts and deny the conclusion. *Davis v. Green*, 260 U. S. 349, 350, 67 L. ed. 299. "Specific admissions in the answer must outweigh general denials". *Puget Sound International Ry. & P. Co. v. Kuykendall* (D. C. Wash.), 293 Fed. 791, 792.

In addition as shown in the statement of the case it would cost the appellant from \$21,500.00 up to comply with the Commission's citation to produce evidence to conclusively show the reasonableness of appellant's wholesale prices according to the formula for valuation prescribed by sec. 4 (f) of the Utilities Act (Ky. Stat. 3952-19).

Evidence of attorney fees was not introduced since the members of the court were experts in the fixation thereof (*McDougal v. Black Panther Oil & Gas Co.* (8th C. C. A.) 277 Fed. 701, 707, headnote 7; and *Tracy v. Spitzer-Rorick Trust & Savings Bank* (8th C. C. A.), 12

Fed. (2d) 755, 756-7), and we did not feel that they would be instructed by the testimony of other experts.

Under the circumstances mentioned the amount in controversy far exceeds \$3,000.00. Compare *Western & Atlantic Railroad v. Railroad Commission*, 261 U. S. 264, 267, 67 L. ed. 645; *Packard v. Banton*, 264 U. S. 140, 142, 68 L. ed. 596; and *Tyson & Bro. v. Banton*, 273 U. S. 418, 426, 71 L. ed. 718.

Equitable Jurisdiction.

The price of appellant's standing by until the Commission has completed its investigation and made its final determination is (1) to permit the Commission to fix the appellant's wholesale contract gas prices upon the Commission's own *ex parte* evidence; (2) to sacrifice the appellant's right to judicial review of the Commission's determination, which must under sec. 7 (a) of the Utilities Act (Ky. Stat. 3952-44) be commenced within twenty days; and (3) to expose the appellant and its officers, agents and employees to fines, penalties and punishment under sec. 9 of the Utilities Act (Ky. Stat. 3952-61).

The alternative is the expenditure of \$21,500.00 and up in complying with the Commission's order of investigation. If it should then develop that the Commission is without authority to regulate appellant's wholesale prices the loss of such expenditure would obviously be irreparable.

So far as penalties are concerned the appellant's plight is well illustrated by the opinion in *Wadley Southern Railway Co. v. Georgia*, 235 U. S. 651, 59 L. ed. 405. In that case the railroad company did the very thing suggested as appellant's proper course by the majority

opinion below, that is, stood by and treated as void an order of the railroad commission of Georgia and later sought to defend in an action for a penalty upon the ground of the unconstitutionality of the order. The defense proving not well founded, the company was mulcted in the penalty. The opinion pointed out that the company should have promptly availed itself of a judicial remedy to test the validity of the order. In conclusion (p. 669) it was said:

"If the Wadley Southern Railroad Company had availed itself of that right, and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

"But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful,"

It was also noted (p. 660) that the validity of the order could have been attacked either in the state or federal courts.

"* * * In the Federal courts the method of procedure when administrative orders are attacked is now regulated by §266 of the Judicial Code * * *" (p. 661).

In their opinion the majority below cited in support of the supposed lack of equitable jurisdiction *Cruikshank v. Bidwell*, 176 U. S. 73, 80, 44 L. ed. 377; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796; *Cavanaugh v. Looney*, 248 U. S. 453, 456, 63 L. ed. 354; *Federal Trade Commission v. Claire Co.*, 274 U. S. 160, 71 L. ed. 978; *Morgan (Matthews) v. Rogers*, 284 U. S. 521, 526, 76 L. ed. 447; and *State Corporation Commission of Kansas v. Wichita Gas Co.*, 290 U. S. 561, 78 L. ed. 500.

In *Cruikshank v. Bidwell* an importer of teas, impounded by the customs collector as impure and unwholesome, sought an injunction to restrain the collector from further withholding the teas and from destroying them (p. 79). It was said (p. 81):

"Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. * * *"

In *Boise Artesian Hot & Cold Water Co. v. Boise City*, the company sought an injunction against an action at law brought against it by the city in a state court for the recovery of license fees imposed by the city for use of its streets for mains, etc. Naturally, the supposed invalidity of the ordinance could have been urged in the law action, which could, as was pointed out (p. 287), had the company acted seasonably, been removed to the federal court.

In *Cavanaugh v. Looney*, this Court refused to enjoin the Attorney General of Texas and the Board of Regents of the University of Texas from instituting proceedings for the condemnation of all or a portion of the appellants' premises to extend the campus of the University, saying (p. 456):

"When considered in connection with established rules at law relating to the power of eminent domain, complainants' allegations of threatened 'irreparable loss and damage' appear fanciful.

* * *

In *Federal Trade Commission v. Claire Furnace Co.*, the court below enjoined enforcement of an order of the Commission requiring the complainant companies "to furnish monthly reports of cost of production, balance sheets and other voluminous information in detail upon a large variety of subjects relating to the business in which complainant corporations" were engaged. The Federal Trade Commission Act specially provided for the issuance of writs of mandamus for compliance with the Commission's lawful orders and for prosecution for penalties for failure to testify or report, upon application by the Commission to the Attorney General. It was held in effect that the Commission should first submit the legality of its inquiries to the Attorney General after whose decision the complainants would have ample opportunity to comply or contest an enforcement proceeding on the law side of the *federal district court*. See page 174:

"* * * It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful, before asking the court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law

officer of the government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. * * *

In *Matthews v. Rogers*, the appellees secured an injunction in the court below against the imposition of a state privilege tax on persons engaged in the business of buying and selling cotton. The case largely turned upon whether the tax, if illegal and paid under protest, could be recovered under the laws of Mississippi. Having determined this in the affirmative (pp. 526-527), under the uniform rule the decree of injunction was reversed and each party left to the payment of the tax and his remedy for recovery thereof in the state courts "or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present" (p. 526).

In *State Corporation Commission v. Wichita Gas Company*, the scope of the Commission's investigation as ultimately determined was not to fix rates of the distributors nor the price for gas charged them by the pipe line company which was an interstate carrier (pp. 563-564), but to ascertain the charges made by holding or affiliated companies for services rendered and commodities furnished the distributing companies with a view in subsequent proceedings of allowing only reasonable amounts therefor as operating expenses to the distributors (pp. 564-565, 569). It was held that the Commis-

sion's order neither fixed appellees' rates nor the price to be paid to the pipe line company; and that the facts thereby found were not *res adjudicata* and could be attacked in a subsequent proceeding to fix the appellees' rates after which they were entitled to a day in court. In that case there was no question of the Commission's jurisdiction to fix the rates of the appellees which distributed gas at retail in a number of Kansas municipalities.

An action under sec. 9 of the Utilities Act (Ky. Stat. 3952-61) by the Commonwealth of Kentucky against the appellant for recovery of penalties therein prescribed would not be removable to the Federal District Court under Judicial Code sec. 28, as amended, (U. S. C., tit. 28, sec. 71) since (1) the action would not arise under the Constitution or laws of the United States, nor (2) would it be between citizens of different states, the Commonwealth not being a citizen. *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 46 L. ed. 144. So also, an action of mandamus brought by the Commissioner under sec. 4 (b) of the Utilities Act (Ky. Stat. 3952-13) would likewise not be removable. *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. ed. 743.

"Rules of comity or convenience must give way to constitutional rights". *Oklahoma Natural Gas Co. v. Russell*, *supra*, 293. Accord: *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U. S. 196, 204-205, 68 L. ed. 975; and *Railroad & Warehouse Commission v. Duluth Street Railway Co.*, 273 U. S. 625, 628, 71 L. ed. 807, as follows:

"* * * But the plaintiff, if it prefers to entrust the final decision of the courts of the United States rather than to those of the state, has a right to do so. * * * But as against these considerations it must be remembered that the requirement

that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the district court of the United States."

There are abundant decisions in this Court that injunction is an apt remedy to prevent an unlawful attempt to regulate one's business and affairs. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984; *Packard v. Banton*, *supra*, 143; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445; *Tyson & Bro. (United Theatre Ticket Offices) v. Banton*, *supra*, 427-8; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239, 73 L. ed. 287; and *Thompson v. Consolidated Gas Utilities Co.*, 300 U. S. 55, 59, 81 L. ed. 510.

It is equally well settled by the decisions of this Court that one is not obliged to take the risk of prosecution, fines and penalties, of imprisonment of one's officers, agents and employees, or of the loss of one's property in order to test the constitutionality of an attempted regulation of one's business and affairs, rather than resort to the equitable remedy of injunction. Compare *Truax v. Raich*, 239 U. S. 33, 37-9, 60 L. ed. 131; *Pennsylvania v. West Virginia*, 262 U. S. 553, 592-3, 67 L. ed. 1117; *Terrace v. Thompson*, 263 U. S. 197, 215-6; 68 L. ed. 255; *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 386, 71 L. ed. 303; *Swift & Co. v. United States*, 276 U. S. 311, 326, 72 L. ed. 587; *City Bank Farmers Trust*

Co. v. Schnader, 291 U. S. 24, 34, 78 L. ed. 628; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 414, 79 L. ed. 446; and *Carter v. Carter Coal Co.*, 298 U. S. 238, 287-8, 80 L. ed. 1160.

It is equally well settled by the decisions of this Court that the test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy at law *in the federal court*, and not the presence or absence of such a remedy *in a state court*. Compare *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819; *Chicago, B. & Q. Railroad Co. v. Osborne*, 265 U. S. 14, 16, 68 L. ed. 878; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 70 L. ed. 641; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 126-7, 74 L. ed. 737; *City Bank Farmers Trust Co. v. Schnader*, *supra*, 29; and *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69, 80 L. ed. 47.

The Johnson Act.

The Johnson Act is as follows:

“* * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) *affects rates* chargeable by a *public utility*, (2) does not interfere with interstate commerce, and (3) has been made after *reasonable*

*notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State. * * *.*" (Italics ours).

The Act does not embrace every order of the Commission, but only an order which "affects rates". The Commission's orders may cover a wide variety of other subjects. Compare secs. 4 (e), (i), (k) and (l) of the Utilities Act (Ky. Stat. 3952-18, -22, -24 and -25) respecting orders affecting utility rules, regulations, practices, equipment, appliances, facilities, service, accounting, securities, construction, extensions, etc.

It is the purpose of the Act to take away from the United States district courts jurisdiction to enjoin rates fixed by a rate-making authority on the often encountered ground of confiscation, and usually so called. The Act also mentions diversity of citizenship, but since the legislative authority is supreme in its own sphere except as limited by the Constitution, all of the cases necessarily involve the charge of confiscation, unless it be one where an action might be brought under a state statute to review the rate-making order in a federal court on the ground of diversity of citizenship as in *Helena Water Co. v. Helena* (D. C. Ark.), 277 Fed. 66.

The Act assumes that a complainant is a "public utility" and subject to the jurisdiction of the rate-making authority, which in fixing rates acts, of course, in a purely legislative capacity. "Affect" is variously defined as "to act upon", "to influence", "to change", "to alter", etc. A rate may be established, increased, decreased or repealed; discounts for prompt payment and penalties for delinquencies are but decreases or increases. This exhausts the gamut of "affecting" a rate.

The orders complained of are not of that nature. They undertake to find that the appellant is a "utility"

in respect of all its gas sales, to non-affiliates as well as to its subsidiary, and that all its wholesale prices are subject to the rate regulatory jurisdiction of the Commission, notwithstanding the franchise rate contracts, whereon to base the attempted investigation thereby initiated for the purpose of regulating such wholesale prices.

The appellant's status in respect of its wholesale deliveries to non-affiliates as a utility *vel non* is a judicial and not a legislative question. Compare *Terminal Taxicab Co. v. Kutz*, *supra*; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 536-7, 67 L. ed. 1103; *Michigan Public Utilities Commission v. Duke*, *supra*, 557-8; *Tyson & Bro. v. Banton*, *supra*, 431. The situation is analogous to the determination of what is a public use, which is a judicial and not a legislative question. Compare *Cincinnati v. Vester*, 281 U. S. 439, 446, 74 L. ed. 950. It is obvious that the inviolability of the franchise rate contracts under the contract clause and the constitutionality of sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) under the contract and due process clauses are purely judicial questions. It, therefore, seems plain that in undertaking to find the appellant to be a utility and subject to its rate-regulatory jurisdiction, the Commission has invaded the province of the judiciary; and that the orders entered are not legislative in character and not within the purview of or as contemplated by the Johnson Act.

While the appellant appeared before the Commission and questioned its jurisdiction, for the same reasons herein complained of, that was but natural, out of deference, abundant precaution, and in the hope of avoiding expensive litigation.

In any event the Commission's actions do not meet the specifications of the Johnson Act. Its findings as to the appellant's supposed utility status and its own jurisdiction were not based upon any evidence adduced before the Commission but were "merely statements made by the Commission based on general information of the members of said Commission" (R. 16, 20-58, 63, 86). That was not a "hearing" after "reasonable notice" as required by the Johnson Act, but an "exercise of arbitrary power". Compare *Interstate Commerce Commission v Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93, 57 L. ed. 431 ("* * * the Commissioners cannot act upon their own information as could jurors in primitive days. * * *"); *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, 265-6, 68 L. ed. 667 ("* * * To refuse to consider evidence introduced, or to make any essential finding without supporting evidence, is arbitrary action. * * *"); *Northern Pacific Railway Co. v. Department of Public Works*, 268 U. S. 39, 44-5, 69 L. ed. 836 ("* * * An order based upon a finding made without evidence (citation), or upon a finding made upon evidence which clearly does not support it (citation), is an arbitrary act against which courts afford relief. * * *"); *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 71, 79 L. ed. 761; and *Railroad Commission v. Pacific Gas & Electric Co.*, 82 L. ed. (Adv. Ops.) 327, 330 ("The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimum requirement. (Citation): There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. (Citations) * * *").

The court below found (R. 86) :

“* * * all its orders in this matter have been based wholly upon the *ex parte* information of the defendant members of the Commission.”

To have to drag through a price-fixing investigation in order to determine the question of appellant's being subject to the jurisdiction of the Commission is not a “plain, speedy and efficient remedy” to try that question, as prescribed by the Johnson Act; yet it is extremely doubtful if anything other than a final determination or order of the Commission is reviewable under Sec. 7 (a) of the Utilities Act (Ky. Stat. 3952-44), or otherwise in the state courts. See *Smith v. Southern Bell Telephone & Telegraph Co.*, 268 Ky. 421, 104 S. W. (2d) 961. In that case the plaintiff brought a mandatory action against the defendant to furnish certain service. The Kentucky Court of Appeals without inquiring if the defendant had filed schedules of service of the type demanded and rates therefor under sec. 5 of the Utilities Act, which could be enforced judicially, remitted the plaintiff to the Commission for relief pointing out that he would then have the right of appeal to the state courts under the provisions of the Utilities Act. If a remedy in the state courts be doubtful, the Johnson Act is inapplicable. Compare *Corporation Commission v. Carey*, 296 U. S. 452, 457-8, 80 L. ed. 324; and *Mountain States Power Co. v. Public Service Commission*, 299 U. S. 167, 169-70, 81 L. ed. 99.

“Rates”, as used in the Johnson Act, as in other statutes, denotes a uniform remuneration for a service rendered to all alike, fixed in advance and published, and not the subject of negotiation for each separate service. The term does not comprehend a single transaction, evidenced by formal agreement, entered into after extended negotiations at arm's length, for the delivery of large

quantities of a commodity over a term of years, at a stipulated price per unit.

“* * * ‘rates’ must be held to mean a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.”

State v. Spokane & Inland Empire Railroad Co.,
89 Wash. 599, 154 Pac. 1110, L. R. A. 1918
C, 675, 680.

“The Commission’s powers are confined to those rates, tolls or charges that the public must pay for service.”

Chippewa Power Co. v. Railroad Commission,
(Wis.), 205 N. W. 900.

The object of this suit is not to enjoin the enforcement of any legislative order of the Commission affecting rates but to prevent the coerced expenditure of \$21,500.00 and up except under menace of suffering sacrifice of appellant’s property far more serious. The appellant’s dilemma is immediate and dangerous; its attack on the jurisdiction of the Commission to regulate its wholesale prices is *bona fide*. It is the morality of modern equity jurisprudence that in such a dilemma constitutional rights may and should be determined before the incurrence of loss of property or penalties; nor was the Johnson Act intended to the contrary.

The attack in this cause is not on an order which “affects rates”, that is, a rate-making order; but (as in *Terminal Taxicab Co. v. Kutz*, *supra*, 257) strikes at the jurisdiction of the Commission over the appellant’s business severally with respect to each of its wholesale contract gas prices. The appellant seeks to judicially ascertain (and it is a judicial question) if the Commission has or has not rate-regulatory jurisdiction of its whole-

sale gas business; if not, then the appellant should not be put to excessive expense in an unnecessary showing of the reasonableness of its wholesale prices.

While a valid exercise of legislative policy, the Johnson Act can scarcely be said to supply a defect or abridge a superfluity in the common law, which is, according to Blackstone, the object of remedial legislation. Compare 1 *Bl. Com.* 86-7.

THE MERITS.

Sales to Non-Affiliates.

The production of natural gas and its transmission from and across private lands, pursuant in each case to appropriate grants from the several landowners, and its sale in bulk at arm's length by term contracts to non-affiliated distributing utilities is a private enterprise not affected with a public interest and not subject to price regulation. Compare *United States v. Uncle Sam Oil Co.* (of the Pipe Line cases), 234 U. S. 548, 561-562, 58 L. ed. 1459; *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 126-127, 76 L. ed. 655; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290, 308, 78 L. ed. 1267; *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 78-79; *Natural Gas Pipeline Co. v. Slattery*, 82 L. ed. (Adv. Ops.), 205, 208; *Nowata County Gas Co. v. Henry Oil Co.* (8th C. C. A.), 269 Fed. 742, 745-747; *Puget Sound International Ry. & P. Co. v. Kuykendall* (D. C. Wash.), *supra*, 793-794; *Texoma Natural Gas Co. v. Railroad Commission* (D. C. Tex.; three judges), 59 Fed. (2d) 750, 752-753; *Central Kentucky Natural Gas Co. v. Railroad Commission* (D. C. Ky.; three judges), 60 Fed. (2d) 137, 139; *Pennsylvania R. Co. v. Pittsburgh L. & W. R. Co.* (6th C. C. A.), 83 Fed. (2d) 861, cert. den. 299 U. S. 572, 81 L. ed. 421; and

Southern Ohio Power Co. v. Public Utilities Commission (Ohio), 143 N. E. 700, 34 A. L. R. 171.

All gas passing through the Lexington Line is produced by Petroleum Exploration and sold exclusively to the Central, a non-affiliate, at Lexington, Richmond, and Irvine; and all gas passing through the Somerset Line is produced by the appellant and part thereof (10,000,000 cubic feet annually) sold Edwards & Eversole Gas Company, a non-affiliate, at London; and the remainder sold to appellant's subsidiary, Peoples, at Manchester and Somerset. The sales to the Central and Edwards & Eversole are not "affected with a public interest" in legal contemplation. Of course, in a general way, the public has a price interest in the product of every business, including that of the butcher, the baker and the miner (under which classification the appellant falls), however, the interest is not such as to deprive the proprietor of the right to fix the price for his product especially when not sold or delivered to the public.

A franchise is a matter of public grant and entails the correlative duty of public service. The appellant occupies no such relation, either directly or indirectly, to the public of Lexington, Richmond, Irvine, Ravenna or London. Compare *Terminal Taxicab Co. v. Kutz*, *supra*. Others have acquired the public privilege and have undertaken the public service. They have contracted with the appellant for specified quantities of natural gas, not to be delivered to the public, but in bulk to the distributor at the corporate limits for ultimate delivery to the public by the distributor through its own mains. The appellant and each of the Central, D. L. Johnson and Edwards & Eversole dealt at arm's length. Under such circumstances, the price fixed is the best evidence of what was fair; the appellant was not obliged

to sell, nor they to buy. This Court has broadly implied, if not held, that an arm's-length contract of this nature is not subject to public regulation. Compare *Western Distributing Co. v. Public Service Commission*, *supra*, 126-127; *Dayton Power & Light Co. v. Public Utilities Commission*, *supra*, 308; and *Natural Gas Pipeline Co. v. Slattery*, *supra*, 208. The court below, in a three-judge case, *Central Kentucky Natural Gas Co. v. Railroad Commission*, *supra*, 139, has held that such a contract should be accepted "as part of the cost of operation". That there is no affiliation, domination or control whatsoever, direct or indirect, immediate, intermediate or remote, between the appellant on the one hand and the Central, or D. L. Johnson, or his assignees, or Edwards & Eversole, on the other hand, is beyond question. It is so alleged in the bill (R. 12); not denied by the answer, save lack of knowledge (R. 54); proved (R. 66-68); found by the court below (R. 84); and not excepted to by the defendants (R. 88-89).

Assuming, merely for the purpose of argument, that appellant's wholesale prices are too high the remedy lies not in the Commission's reduction thereof but in the Commission's allowing to the distributing utility as an operating expense only the reasonable value of the gas. Compare *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 14, 53 L. ed. 371; *Citizens' Pass. Ry. Co. v. Public Service Commission*, 271 Pa. 9, 114 Atl. 642; *Chippewa Power Co. v. Railroad Commission* (Wis.), *supra*. If the Commission has jurisdiction to reduce the appellant's wholesale prices then it would have like jurisdiction to raise them which, as the Pennsylvania court pointed out, in the case cited, "would be a great surprise to everybody". If after investigation it should develop that the appellant's wholesale prices do not furnish an adequate return upon the value of its properties, that the Commission has no intention of raising such prices is obvious

from the fact that only the appellant, and none of its purchasers, is party to the investigation.

Let us look at the situation from the viewpoint of others who sell, at arm's length, to distributing utilities in the competitive market. A coal operator, in making a term contract for the delivery of coal to a manufactured gas utility would be subject to the jurisdiction of the Commission to fix the price of coal at something different from that agreed to by the operator in competition with others. So, also, as to the price which a natural gas distributing utility pays a founder for his pipe, a stationer for his supplies, land owners as bonus and delay rentals for its own leases, and every other conceivable item which the utility must enter the competitive market to purchase. In short, the utility's management might just as well abdicate and the Commission install its own manager.

Properly construed the Utilities Act does not embrace the appellant's wholesale gas business at Lexington, Richmond, Irvine and London. The Act speaks of "any facility * * * for * * * the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas". Of course, "manufacture" and "manufactured" may be eliminated; also "storage" as the Court judicially knows that natural gas cannot be stored for market. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 59; and *Transcontinental Oil Co. v. Spencer* (5th C. C. A.), 6 Fed. (2d) 866, 868, headnote 2. Also, appellant does not sell, distribute or furnish (directly or indirectly) to the public of Lexington, Richmond, Irvine (Ravenna) or London. So the question remains, Does the Act include the appellant as being engaged in the "production or furnishing of natural gas

for the public of those cities *for compensation?*" The appellant receives no compensation from the public of any of those cities directly; if the Act is construed to mean remote compensation from the public through the distributor it would apply to every producer who delivers gas at the well head to gathering lines whence it flows to pipe lines and thence to city mains and to the public at the meter for consumption at the burner tip. To extend the Act beyond the necessities of the case (the regulation of service and rates to the public) so as to include price regulation of the entire range of production of gas would render it unconstitutional as an unwarranted invasion of private business. Every owner of land has a right to explore it for its mineral content or to lease the right to another for the purpose. Under such a construction no producer of gas could without the Commission's consent issue securities (sec. 4 (k) Ky. Stat. 3952-24); or even drill a well (sec. 4 (l); Ky. Stat. 3952-25).

The like is true of the Act in speaking of "any facility * * * for * * * the transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public for compensation." The transmission of gas from its own leases through its own lines no matter in what quantities or to what distances and though the gas be intended for sale to others for ultimate public consumption does not change the status of the transmitter from a private to a common carrier. *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 78-79; *Texoma Natural Gas Co. v. Railroad Commission*, (D. C. Tex.; three judges) *supra*, 752-753.

In the court below defendants' (appellees') counsel in their brief took the following rather startling position:

"* * * However, the defendants' jurisdiction and authority to regulate the complainant's rates

does not depend on whether or not the complainant's business is private or public, but depends on whether or not the complainant is a 'public utility' within the meaning of that term as defined by the Kentucky Legislature and contained in Section 3952-1 of the Kentucky Statutes."

The General Assembly of Kentucky, by its definition of a "utility" in sec. 1 of the Utilities Act (Ky. Stat. 3952-1), could not by mere legislative fiat convert a private enterprise into a public utility. Compare *Michigan Public Utilities Commission v. Duke*, *supra*, 577-578; *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101; and *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264.

If the appellees contend for an unconstitutional construction, they do so at their peril. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 74-76.

Perhaps in this Court, as in the court below, the appellees will cite the case of *State Tax Commission v. Petroleum Exploration*, 253 Ky. 119, 68 S. W. (2d) 777. That case involved the liability of the appellant for a so-called "franchise tax" under Ky. Stat. sec. 4077, quoted in the opinion therein. It will be noted from the opinion that the point was squarely raised that the statute applied only to a public utility and that the General Assembly could not by legislative fiat convert the appellant's private business into that status (p. 779). The court declined to decide the issue and was content to hold that the appellant was "performing a public service", within the meaning of the statute, and was, therefore, a "pipe line company" as therein defined (p. 780); but did not decide that it was a "public utility".

The opinion adverts to the fact that, whether exercised or not, operators of "oil or gas well or wells or

pipe line or lines for conveying, transporting or delivering oil or gas or both oil and gas" had been given the power of *eminent domain* "all such being hereby declared to be a public use" (pp. 778, 779). The General Assembly by such declaration could not convert a private business into a public utility. *Michigan Public Utilities Commission v. Duke, supra; Frost v. Railroad Commission, supra, and Smith v. Cahoon, supra.* *Eminent domain* is misused; it denotes a taking for *public use*. It has long been the law of Kentucky that proprietors of mines, quarries, oil wells, gas wells, timber tracts, *et cetera*, may condemn a *private* way over the lands of others to market their products. The taking is barely justified constitutionally, so the Kentucky Court of Appeals holds, by the fact that while the user by the original condemnor is private, others similarly situated may elect to exercise a similar use upon like terms, that is, making compensation. Such is the constitutional theory. However, the practical end to be gained is admittedly to permit such proprietors to conveniently transport their products to market. *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S. W. 762, 764, 766; and *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 331, 332.

State Tax Commission v. Petroleum Exploration is not pleaded as an estoppel or judgment in bar; nor could it be. Decided in 1934, it involved "franchise tax" assessments for the years 1932 and 1933. Contrary perhaps to the rule in most jurisdictions a Kentucky judgment of tax liability *vel non* is *res adjudicata* of the particular assessment only. It fixes no continuing status of any kind — either of liability or immunity — in either the federal or state courts. See *Covington v. First National Bank*, 198 U. S. 100, 107-109, 49 L. ed. 963; and the same case below, *First National Bank v. Covington*,

129 Fed. 792, 799-804, where the Kentucky decisions are cited, analyzed and construed.

Separability of Business.

That the appellant's wholesaling gas to its subsidiary may be affected with a public interest does not so affect its wholesaling to non-affiliates. A corporation may at the same time be engaged in business partly private and partly public. Compare *Santa Fe P. & P. Ry. Co. v. Grant Bros.*, 228 U. S. 177, 185, 57 L. ed. 787; *Terminal Taxicab v. Kutz*, *supra*, 256; *Puget Sound International Ry. & P. Co. v. Kuykendall*, *supra*, 793; *Chenery v. Employers' Liability Assur. Corp.* (9th C. C. A.), 4 Fed. (2d) 826, 827.

At the expense of repetition we emphasize that all gas flowing through the Lexington Line is produced by the appellant and disposed of to a non-affiliate, the Central. In the case of the Somerset Line the gas is disposed of in part to a non-affiliate, Edwards & Eversole, and the balance to appellant's subsidiary, the Peoples. All gas in the Knox County Lines is disposed of to the subsidiary.

In *Terminal Taxicab Co. v. Kutz*, the company secured the exclusive privilege of furnishing taxi service at Union terminal and some hotels and agreed to provide adequate service; it also furnished taxi service from its central garage on call, usually by telephone. The Public Utilities Commission of the District of Columbia sought to exercise jurisdiction over the company's business; and it sought injunction. This Court awarded an injunction "to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same". (p. 257).

The bill in this cause (R. 20-22) prays for relief against the investigation severally in respect of the price for gas fixed by each of the wholesale contracts.

Direct Regulation of Prices to Subsidiary.

Where there is an affiliation, as in this case between the appellant and the Peoples, a public utilities commission does have authority to inquire into the reasonableness of the wholesale price charged the subsidiary and to be allowed to it as an operating expense. However, the practice is to regulate the retail rates of the subsidiary distributor and not the wholesale price of the parent, for to do the latter would serve no useful purpose so far as the public is concerned. Were it not for the several franchise rate contracts entered into by the municipalities of Manchester, Somerset, Barbourville and Corbin, respectively, with the Peoples (a matter which will be presently discussed), we would concede the right of the Commission in a proceeding against the Peoples to regulate the rates at which it distributes gas in those municipalities and in so doing to fix as an operating expense the reasonable value of the gas delivered to it by the appellant, regardless of the wholesale contract price fixed therefor. But at most the Commission would be interested only in what the public of those municipalities pays for its gas and not in intercorporate transactions between the appellant and its subsidiary. Having fixed the latter's retail rates with due consideration as an operating expense of a reasonable allowance *only* for the gas which it procures from the appellant, the Commission's function would be performed. How the subsidiary, by means of the wholesale contracts, divides with the appellant the revenues derived by the subsidiary from the public, is a purely private intercorporate transaction for which the Commission cannot

substitute its judgment for that of the corporate directors. Compare *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 320-321, 73 L. ed. 390; and *Western Distributing Co. v. Public Service Commission*, *supra*, 123-125.

Validity of the Franchise Rate Contracts.

THE CONTRACT CLAUSE.

It is well settled by the decisions of this Court that a municipality, when authorized by the state, in a proprietary capacity on behalf of itself and its inhabitants, may fix rates by contract with a utility, for a time not unreasonable, and that a contract so made is within the protection of the contract clause of the United States Constitution and cannot during its term be impaired by subsequent rate-making legislation. Compare *Detroit v. Detroit Citizens' Railway Co.*, 184 U. S. 368, 382, 46 L. ed. 592; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 515-516, 51 L. ed. 1155; *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176; *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352, 359-360, 68 L. ed. 1050; and *Railroad Commission v. Los Angeles Railway Corp.*, 280 U. S. 145, 74 L. ed. 234, and the numerous cases therein cited and in the copious note to the decision as reported in the *Lawyers' Edition*.

"The general powers of a municipality * * * are not sufficient. Specific authority for that purpose is required." *Home Telephone & Telegraph Co. v. Los Angeles*, *supra*, 273. In determining whether or not a municipality has specific authority, this Court turns to the decisions, if any, of the state court. Compare *Vicksburg v. Vicksburg Water Works Co.*, *supra*, 515-516; *St. Cloud Public Service Co. v. St. Cloud*, *supra*, 359-360; and *Railroad Commission v. Los Angeles Railway Corp.*,

supra, 152. In the St. Cloud case it is held that the power to regulate is governmental, while the power to contract on behalf of the municipality and its inhabitants is proprietary (p. 359).

KENTUCKY CONSTITUTION.

Sections 163 and 164 of the Kentucky Constitution are as follows:

Sec. 163. "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith begun thereunder, the provisions of this section shall not apply."

Sec. 164. "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or *make any contract in reference thereto*, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway." (*Italics ours*).

While the language of sec. 164 is in the form of a limitation, it has been held by the Kentucky Court of Appeals in numerous cases that a grant is implicit therein, which is logical as the limitation in respect of time

and manner of granting and contracting necessarily implies the power to grant and contract. The court has held, to use its own language, that sec. 164 is "self operative" and "delegates" to a political subdivision power to grant a franchise.

JUDICIAL CONSTRUCTION.

Irvine Toll Bridge Co. v. Estill County (Oct. 9, 1925), 210 Ky. 170, 275 S. W. 634: In 1909, the fiscal court of Estill county sold a franchise for the erection and operation of a toll bridge across the Kentucky river at a point convenient to public travel between Richmond and Irvine. The bridge was duly erected "and from that time on it was operated under the toll charges fixed in the resolution authorizing the sale of the franchise." The authority of the fiscal court to grant the franchise having been questioned, the court said:

"We have been cited to no statute, nor have we been able to find one *expressly* conferring upon a county or any other subdivision or agency of the state the right to grant a franchise to construct and maintain a toll bridge, or any other franchise affecting highways or bridges, except 'Ferry privileges', and the statute pertaining to granting of franchises to operate ferrys was enacted long before the adoption of our present Constitution, and its section 164 says (S. W. 636) :

"(* * * *

"And it was held in the case of *Christian-Todd Telephone Co. v. Commonwealth*, 156 Ky. 567, 161 S. W. 543, and numerous other cases cited in the notes to that section as published in the 1922 edition of Carroll's Statutes, that the provisions of the section were self-operative and conferred upon the counties and municipalities authority to grant franchises pertaining to subjects of which they were given

jurisdiction. *In other words, the cases referred to hold that such political subdivisions of the state were delegated the power by the provisions of that section to grant franchises with reference to proper subjects in their territory of which they were given supervisory jurisdiction by the laws of the state. (Italics ours; ib.)*

“* * * But when we consider that section 164, *supra*, of the Constitution has been construed to be self-operative, then it necessarily applies to all subjects of which the fiscal court has the acquired jurisdiction, unless some other particular one has been especially provided for, as is true with reference to ferries. There was no statute authorizing the sale of a franchise to a telephone or other public utility company at the time the Christian-Todd Telephone Company Case, *supra*, was decided; nor is there any such statute now, so far as we have been able to find; but, because of the self-operative provisions of section 164 of the Constitution, it was held that the fiscal court, not only could grant such franchises, but that the method pointed out in the section was the only one to be followed. * * *” (S. W. 637).

The case of a municipal gas franchise rests upon still firmer ground. See sec. 163 of the Constitution above quoted. If as stated sec. 164 without more delegated power to grant a franchise, then by like reasoning it delegated power “to make any contract in reference thereto” as the section expressly mentions; and in the Irvine Toll Bridge case the franchise so granted did fix the bridge tolls, which received the court’s approbation. No more appropriate subject for a contract in reference to a franchise than rates can be suggested (*Detroit v. Detroit Citizens Street Railway Co.*, *supra*, 384); and

the Kentucky Court of Appeals in numerous decisions has held that sec. 164 does authorize a rate contract.

In *Moberly v. Richmond Telephone Company* (June 28, 1907), 126 Ky. 369, 103 S. W. 714, the court said:

"* * * The franchise was granted by the city for the term of 20 years, to occupy its streets, alleys, etc. In the ordinance granting it, it was provided that the grantee should not charge exceeding the schedule of rates fixed in the ordinance for service to the citizens of Richmond. * * *"

"Under the present Constitution a city may sell such franchises at public sale to the highest and best bidder for a term of not exceeding 20 years, though they are not exclusive. Without such sale cities may not grant such franchises. Section 164, Const. The city may annex any lawful condition to be exercised with the franchise, which becomes a part of the contract under which it is thenceforth used. And we think it was competent for the city to provide, as a condition to the franchise, that the rates to citizens should not exceed the schedule fixed in the ordinance, or any future ordinance. * * *"

In *Louisville Home Telephone Company v. City of Louisville* (Nov. 20, 1908), 130 Ky. 611, 113 S. W. 855, the court said:

"* * *
"A municipality has the power and right to erect, maintain, and operate plants, and use the public streets for furnishing such utilities for the municipality itself and to its inhabitants. *Such power or duty it may discharge by having others perform them for it upon such terms as may be agreed upon in the form and manner prescribed by law. What, therefore, is commonly termed the 'granting' of a franchise by a city for one of these*

*public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. * * ** From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the service of such utilities, is * * * the securing of good and efficient service, and *upon such terms as will in the judgment of the city's governing body, promote the greatest good, * * * to the entire community, * * *.*" (Italics ours; S. W. 861).

Compare *St. Cloud Pub. Serv. Co. v. St. Cloud*, *Supra*, 359.

In *City of Louisville v. Louisville Home Telephone Co.* (June 21, 1912), 149 Ky. 234, 148 S. W. 13, the city had granted the company in 1900 a telephone franchise, fixing rates and banning party lines. Notwithstanding, in 1909, the company commenced using such lines though of a modified nature from those in use in 1900. The city sought an injunction; the court below denied it; but the Court of Appeals awarded it. The latter said:

"By section 9 of the ordinance, it was provided in part: 'There shall be no party lines constructed or maintained by the owner or company operating such telephone system or plant. * * *' (S. W. 14).

"* * *

"* * * Section 9 of the ordinance fixes the rates which appellee may charge and those rates it is entitled to charge for the service it renders, irrespective of whether that service is single line or party line service. * * * (*ib.*).

"* * *

"* * * It is sufficient that the condition contained in the ordinance, under which it acquired the franchise, prohibits it from constructing or maintaining party lines in the conduct of its business.

The condition is therefore a part of its contract with the city; and if the city insists upon its compliance with that condition appellee can be compelled by the courts to do so, even if the result should be the loss to it of the profits it has been accustomed to realize from its business." (S. W. 16).

In *Lutes v. Fayette Home Telephone Co.* (Oct. 29, 1913), 155 Ky. 555, 160 S. W. 179, involving the amendment of a rate contract, after quoting section 164, of the Kentucky Constitution (S. W. 182) the court said:

"This is not a case where the municipality is undertaking to change the provisions of a contract against the will of the other contracting party. *In cases of that character it is universally held that the contract cannot be changed, since to do so would impair its obligation.* * * *" (S. W. 183).

By the time of the decision of *Paducah v. Paducah Railway Co.* (Feb. 19, 1923), 261 U. S. 267, 67 L. ed. 647, the authority of a Kentucky municipality to contract with a utility fixing rates was so well established that it was conceded. This Court said:

"That the city had power under its charter to prescribe just and reasonable fare from time to time was stated by counsel on the argument and is assumed. * * * (p. 272).

"* * *

"On the argument, it was stated by counsel that the city and company have power to contract as to rates, and we so assume. If the franchise here amounts to a contract binding the company to the fare stated therein as a maximum, as claimed by the city, for the whole franchise term of twenty years, it cannot complain, and there is no ground for relief; and the question whether such rates are too low to give a reasonable return or sufficient is immaterial." (pp. 272-273).

As in the Paducah case, so in this case, counsel for the defendants concede that a municipality has authority under sec. 164 to enter into a rate contract with a municipality. In their answer the defendants expressly admit that all of the franchise rate contracts were, as averred in the bill of complaint, entered into between the municipality and the distributing utility "pursuant to said section 164" (R. 6-11, 47-53); and the court below expressly so found (R. 84-85):

"(10) The gas sold and delivered under each of the several contracts above mentioned is distributed by the purchaser to the public in the municipality at which it is delivered (save that gas delivered at Irvine is distributed to the public therein and also in Ravenna, adjacent thereto), pursuant to a franchise sold and granted by the municipality under authority of section 164 of the Kentucky Constitution to the distributor or its predecessor for a valuable consideration; and in each instance the municipality, under authority of said section 164, in reference to the franchise, and as parcel thereof (except in the case of Lexington, by separate instrument), in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by the grantee and his/its assigns for gas distributed in the municipality pursuant to the franchise and effective during the term thereof. Save the separate rate contract for Lexington, which expires March 1, 1939, the said franchises have from nine years upward yet to run."

However, the answer seeks to imply as a matter of law that such contracts were entered into "subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation" (R. 47-53). The franchise rate contracts contain no such provision (R. 26-39, 40).

The power to fix rates by regulation on the one hand and by contract on the other are not destructive of each other so long as the latter power is not exercised; but when it is and rates are so fixed by contract pursuant to proper authority (in this case expressly admitted) the power to fix by regulation is necessarily suspended for the term of the contract. *St. Cloud Public Service Co. v. St. Cloud*, *supra*, 360:

"* * * and where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding. *Paducah v. Paducah R. Co.*, 261 U. S. 272, 273, 67 L. ed. 650."

"* * * And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. (Citation). And in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. (Citation)."

Railroad Commission v. Los Angeles Railway Corp., *supra*, 152.

In *Union Light, Heat & Power Co. v. Railroad Commission* (Oct. 14, 1926), 17 Fed. 2d 143, 148, the court below, three judges sitting, held:

"* * * These two sections of the Constitution (163 and 164) took away from the General Assembly the power to grant local franchises, and expressly vested that power in the municipalities of the state. * * *" (Parenthetical interpolation ours).

In *City of Ludlow v. Union Light, Heat & Power Co.* (December 3, 1929), 231 Ky. 815, 22 S. W. (2d) 909, the Kentucky Court of Appeals followed that decision, in the course of an elaborate opinion, saying:

"* * * but the use of the streets of the city and the granting of franchise rights therein is vested in the municipality by the plain provision of section 164 of the Constitution * * *"

"* * * It (the court below in 17 Fed. (2d) 143) also held that the construction of the act contended for by the city, namely, that the Railroad Commission has the power to compel and regulate service within the municipality would be in effect to say that the General Assembly had the right to confer upon the Commission the power to set aside the mandatory constitutional provisions of sections 163 and 164, which took away from the Legislature the power to grant local franchises and expressly vested that power in the municipality." (S. W. 911; parenthetical interpolation ours).

In the *City of Campbellsville v. Taylor County Telephone Co.* (June 4, 1929), 229 Ky. 843, 18 S. W. (2d) 305, the city, pursuant to section 164 of the Kentucky Constitution, sold a telephone franchise to the company in July, 1920, which fixed the rates for service. Of this the court said:

"* * * It was proper for the franchise to provide the conditions under which, and the rates for which, the service should be rendered. * * *"
(S. W. 308).

In *Kentucky Utilities Co. v. City of Paris* (Feb. 17, 1931), 237 Ky. 488, 35 S. W. (2d) 873, the city, in March, 1913, sold a 20-year gas franchise to the company's predecessor, fixing a minimum rate of 35¢ per Mcf net and a maximum rate of 55¢ gross, less 5¢ for prompt

payment, that is, 50¢ net. At that time, a 35¢ net rate was in force in Lexington, Winchester and Mt. Sterling. The franchise further provided that "when an increase in the rates is made at any time in those cities, a similar increase shall become effective and operative in Paris". The franchise in those cities having been granted in 1905 expired in 1925 and a controversy over new franchise rates having arisen and litigation having ensued, by an agreed order a 50¢ rate was made temporarily effective, of which 10¢ was to be impounded pending the fixation of a permanent rate in those cities. Thereupon, the company put in effect a like rate in Paris, that is 50¢, of which 10¢ was impounded. This suit, which was brought for the purpose of recovering the impounded fund and preventing the company from charging in excess of 40¢, was dismissed. The court said (S. W. 874):

"The question is whether the rate increases made in the manner and under the conditions stated in Lexington, Mt. Sterling and Winchester justify the appellant in making a similar increase in Paris. *The franchise constitutes a contract and its obligations are binding upon both parties.*" (Italics ours).

The Lexington rate contract involved herein (R. 27-31) has been before both the Kentucky Court of Appeals and this Court; and by both affirmed.

Of it, in *Central Kentucky Natural Gas Company v. City of Lexington (same v. Wright)* (June 7, 1935), 260 Ky. 361, 85 S. W. (2d) 870, the Court of Appeals said:

"The point for our consideration, therefore, may be narrowed down to a determination of whether or not section 2 of Resolution 74 in effect, if not in fact, fixed a rate. If it did, we are not concerned with the policy or wisdom of the ordinance

* * * the matter was one entirely between the gas company and the city. * * * (S. W. 872).

"It follows from what we have said that both Resolution 74 and Ordinance 271 enacted pursuant thereto are valid as contracts and could not be repealed as attempted, and that it is the plain duty of the public agencies concerned to lend every effort to bring this long-pending litigation to an end." (S. W. 873).

Of it, the Lexington rate contract, in *Wright v. Central Kentucky Natural Gas Co.* (March 16, 1936), 297 U. S. 537, 542, 80 L. Ed. 850, this Court said:

"The case comes here on appeal. Appellants, consumers of gas, contend that the obligations of the original franchise contract have been impaired by the attempted compromise in violation of the contract clause of the Federal Constitution and that appellants have been deprived of vested property rights in the impounded fund without due process of law contrary to the Fourteenth Amendment. On examining the franchise contract and the proceedings for the impounding of amounts collected from consumers * * * we find no warrant for a conclusion that appellants had any vested right which precluded the city from effecting a reasonable adjustment of the controversy over rates and from entering into a contract fixing a reasonable rate for the period during which the fund was impounded as well as for the future. * * * In making that settlement, as well as in the making of the original franchise contract, the consumers were represented by the city. * * *

LEGISLATIVE CONSTRUCTION

By *Ky. Stat.*, sec. 201 e-1 (1920, c. 61), printed in the appendix, the jurisdiction of the Railroad Commission was enlarged to include "telephone", "telegraph", "natural gas" and "steamboat" companies and other companies engaged in the business of intrastate water transportation, transmission of messages and distribution of natural gas. Of these only "telephone" and "gas" companies were among the utilities enumerated in section 163 of the Kentucky Constitution, that is, "street railway, gas, water, steam heating, telephone, or electric light company". Accordingly, the General Assembly was at pains to make the following exception in 201 e-1:

"* * * nor shall the provisions of this act apply to any telephone or gas company operating in any municipality under a franchise or contract fixing or regulating the rates which said company, may charge, or the terms and conditions under which such company is operating; * * *"

This of itself was a legislative construction of sections 163 and 164 of the Kentucky Constitution and plain admission that the General Assembly conceived itself to be without power to trench upon the exclusive constitutional authority of a municipality to grant a gas or telephone franchise and make a contract fixing the rates to be charged.

UTILITIES ACT AND OBITER DICTA

It is, therefore, difficult to perceive how it can be doubted that secs. 163 and 164 of the Kentucky Constitution, as construed and applied in the divers decisions above cited and quoted (and more could be added), authorize a municipality in preference to a gas franchise

to make a contract fixing rates. None the less, after having expressly excluded from the regulatory power of the Railroad Commission gas rates fixed by municipality-utility franchise rate contract, in obvious deference to said secs. 163 and 164, the General Assembly did an "about face" in 1934 and undertook, by the Utilities Act (sec. 4 (n); *Ky. Stat.* 3952-27), to take from municipalities their constitutional power to fix rates by contract made in reference to a franchise; and to make such contracts theretofore entered into subject to the rate-making jurisdiction of the Commission.

Recently, June 20, 1936, upon review by a single Justice of the Court of Appeals, of an interlocutory order, overruling a motion to dissolve a temporary injunction, as permitted by the Kentucky practice, the Justice, in his opinion, discussed the constitutionality of sec. 4 (n) *obiter dictum*. *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 265 Ky. 286, 96 S. W. (2d) 695.

No rate contract was involved. The facts as stated in the opinion were as follows:

"This case is before me on a motion made by the defendant, the city of Louisville, to dissolve a temporary injunction granted by the circuit court enjoining the city from enforcing an ordinance which provides for reduction of plaintiff's rates for local exchange telephone service within the city of Louisville. (S. W. 696).

"* * *

"* * * The plaintiff is the owner of a franchise granted by the General Assembly of Kentucky to the Ohio Valley Telephone Company on April 3, 1886. In 1924 this franchise was owned by the Cumberland Telephone & Telegraph Company, and in that year a consolidation of its properties and

the properties of the Louisville Telephone Company, which operated a competing telephone exchange in Louisville pursuant to a franchise granted by the city, was effected with the consent of the city in accordance with the provisions of section 201 of the Constitution. The ordinance in which the city gave its consent to the consolidation provided for certain rates to be charged by the plaintiff for a specific period, *which has long since expired*, and it further provided that such rates should be revised from time to time at the instance of the company or the city. * * * (Italics ours; S. W. 697).

The Justice stated his conclusions of law on the facts so actually involved, as follows:

"As I view the case, a correct decision of the question presented hinges upon the effect to be given to the Public Service Commission Act of 1934 as it relates to the right, if any, which the city of Louisville theretofore had to regulate plaintiff's telephone rates. * * * (S. W. 696).

"* * * The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power. * * * (S. W. 697).

"* * * The power to regulate rates had been delegated to the city by the Legislature, and what it had given it could take away. The act of 1934 which created the Public Service Commission divested the city of the power to regulate rates and reposed that power in the commission." (S. W. 698).

The motion to dissolve was overruled. However, the learned Justice continued:

"* * * I find nothing in section 164 of the Constitution indicating that the state has been deprived of the right to exercise this power (rate regulation), and, that being true, a *franchise* granted by a municipality is granted subject to the right of the state to exercise its police power in this respect." (Parenthetical interpolation and italics ours; S. W. 697).

This, of course, is quite true so long as no more than a franchise is granted, and no rate contract in reference thereto exists. Of such a contract the Justice further continued (*ib.*):

"* * * A municipality may be granted the power to make irrevocable contracts as to rates and the exclusive power of regulation either by constitutional provision or legislative enactment, but the presumption that such a surrender of power has been made will not be indulged unless the grant is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted."

But as we have seen the Kentucky Court of Appeals has repeatedly held that sec. 164 of the Kentucky Constitution does grant the power to enter into a rate contract in reference to a franchise. The Justice continued further thus:

"At the time the 1924 ordinance was enacted the plaintiff was not operating under a franchise granted to it by the city under sections 163 and 164 of the Constitution. The city could contract with plaintiff under its then existing franchise relative to rates. * * * (S. W. 698).

"* * *

"Conceding that the ordinance of 1924 constituted a contract which was binding on the parties

to the extent that it fixed specific rates for a definite period and that its obligations could not be impaired in that respect by legislative enactment, the only provisions of the ordinance involved in this proceeding are those relating to regulation of rates after the expiration of the fixed period. * * * (S. W. 698)

While to us rather puzzling, we fail to perceive wherein this opinion in any wise detracts from the authority of a municipality to enter into a binding rate contract with a utility in reference to a franchise as so often before held by the Court of Appeals sitting *in banc*, many of the decisions of which are cited and quoted above. The Justice cites a number of decisions, an analysis and differentiation of which would further unduly encumber this brief. The solution of the question lies in the distinction made in the above quoted provision from the *Home Telegraph & Telephone Co. v. Los Angeles* case (quoted with approval in *Railroad Commission v. Los Angeles Railway Corp.*, *supra*, 153) between "general powers" and "specific authority". Many cases turn upon the absence of "specific authority". Many others hold that a rate contract made under "general powers" while subject to subsequent rate regulation, is binding meanwhile. Still others hold that where the "specific authority" of the municipality is derived from the legislature as a governmental agency of legislative creation, the legislature, standing so to speak in the relation of principal to agent, may, by itself or through some other lawfully delegated authority alter the rate structure *at the request of the utility*. But there is no case, that we have found, holding that where the municipality has specific authority whether express or necessarily implied, the rate contract may be changed without the utility's consent. In particular compare the quotation

from *Lutz v. Fayette Home Telephone Co.*, *supra*. In the instant case the municipal authority is derived not from the legislature, but from the Constitution.

The Justice further recites that all members of the court except the Chief Justice sat with him on the hearing of the motion and all concurred "in the view that the motion to dissolve the temporary injunction should be overruled", but not, so far as recited, in the *obiter dictum*.

In any event such a decision by a single justice even though others sat with him on the hearing lacks the quality of *stare decisis*, *res adjudicata* and "the law of the case". Compare *Gray v. R. J. Reynolds Tobacco Co.*, 200 Ky. 47, 252 S. W. 134, 135-136, headnote 3:

"An opinion by a judge of the Court of Appeals, who has associated with himself three other judges, on a motion to dissolve a temporary injunction, is not necessarily a precedent nor binding upon the Court of Appeals, though it may be considered for whatever persuasive effect it may have."

In *Smith v. Southern Bell Telephone & Telegraph Co.*, (May 11, 1937), *supra*, the Court of Appeals *obiter dictum* quoted in part the *obiter dictum* from *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, including some of the text of sec. 4 (n) of the Utilities Act. No contract, rate or otherwise, was involved. The facts in the case as stated in the opinion (S. W. 961-962) were:

"W. Taulbee Smith, circuit court clerk of Pike county, Ky., sued the Southern Bell Telephone & Telegraph Company, doing business in Pikeville, Pike county, Ky., to compel it to furnish service to his public office in the following manner:

“(1) Telephone service confined to Pikeville exchange, with no toll calls either inbound or outbound, or

“(2) Both exchange and toll service,—exempting him, however, from liability for tolls on inbound or outbound calls unless the Telephone Company shall first make sure that plaintiff consents to pay tolls on such calls.’”

“LAW” UNDER CONTRACT CLAUSE.

In any event, such decisions, even in a proper case, construing sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27), and under the compulsion thereof, would become part of the statute which as so construed would be a law within the meaning of the contract clause and could not impair the obligation of a contract. Compare *Los Angeles v. Los Angeles Water Company*, 177 U. S. 558, 575, headnote 2, 44 L. ed. 886; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 452-453, 68 L. ed. 382; and *Peoples Banking Co. v. Sterling*, 300 U. S. 175, 182-183, headnote 2, 81 L. ed. 586.

Due Process.

While the appellee's answer (R. 60) denies that “it is the obvious purpose of the said Commission to attempt to lower some or all” of appellant's wholesale prices, the fact remains that, as stated above, it was the obvious purpose of the Commission not to raise any or all of such prices as none of the distributors is made party to the investigation. Furthermore, the answer (*ib.*) avers “that the purpose of the said Commission in instituting and conducting said investigation and proceeding was to determine a fair and reasonable price or rate to be charged by the complainant pursuant to the aforesaid contracts, and to fix said price or rate” and (R. 61) “that

any reduction of any of the said prices so charged by the complainant to the respective distributors for said gas so sold and delivered would be in the public interest and would accrue to the consuming public through other and *subsequent* regulatory action by the said Commission" (Italics ours).

Therefore, if it reduces the appellant's wholesale prices the Commission proposes to pass the reduction on to the public by "subsequent" regulatory action. When? Meanwhile who pockets the reduction? Also, as we have seen, the Commission is without constitutional power to regulate the franchise contract rates of the distributors; and it has made no effort so to do. Hence the distributors would pocket any such reduction from now on.

"* * * There is here no taking for the public benefit; nor is payment of compensation provided. * * *" (p. 78).

"Our law reports present no more glaring instance of the taking of one man's property and giving it to another. * * * And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. * * *" (pp. 79-80).

Thompson v. Consolidated Gas Utilities Corp.,
supra.

Equally offensive to the due process clause is the Commission's mandate (R. 15, 57) to the appellant to "submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable" or "present evidence, if any it can, as will show conclusively the fairness of its present rates and charges for gas which it is selling to companies that are in turn selling the same at wholesale or retail

in this state", from the performance of which no one would derive benefit though it would cost the appellant \$21,500.00 and up to make compliance, for reimbursement of which the appellant could not look to the Commission, the public, nor the appellant's buyers.

Respectfully submitted,

EDWARD C. O'REAR and
ALLEN PREWITT of
Frankfort, Kentucky,

CHAS. N. KIMBALL and
W. J. BRENNAN of
Sistersville, West Virginia,
For the Appellant.

APPENDIX.**KENTUCKY STATUTES.****Duties of Railroad Commission in Relation to Carriers.****§ 201e-1. *Character of carriers subject to the act.*—**

The provisions of this act shall apply to express companies, telephone companies, telegraph companies, natural gas companies and natural gas transportation companies, steamboats and steamboat companies, and all boats and other water craft propelled by the use of oil, gasoline or other means, whether incorporated or unincorporated and doing business in this State in the transportation of goods for hire or compensation between points in this state, or in receiving or transmission of messages between points in this state, or in the distribution furnishing or sale of natural gas as a fuel for domestic or industrial purposes, but the provisions of this act shall not embrace the operation of telephone companies within any city where the rates charged for the transmission of messages and other services may be regulated by local authority, or in the operation of natural gas companies in any city where the rates are now or may be regulated by local authority; nor shall it embrace any telephone company that is operated only in three or less counties; except for the purpose of making joint rates, nor any telephone company which has a capital stock of less than two thousand dollars, if incorporated, or if unincorporated tangible property of less value than two thousand dollars except for the purpose of making joint rates; nor shall the provisions of this act apply to any telephone or gas company operating in any municipality under a franchise or contract fixing or regulating the rates which said company may charge, or the terms and conditions under which such company is operating; and every express company, telephone company,

telegraph company, natural gas company, gas transportation company, steamboats, and steamboat company, shall furnish reasonably adequate service and facilities and the charge made for any service rendered or to be rendered in the transportation of messages by telephone or telegraph, or in the distribution, furnishing or sale of natural gas by any company, or for any service in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, and every unreasonable rule, regulation or practice is hereby prohibited and declared to be unlawful. (1920, c. 61, p. 250, § 1.)

Utilities Act.

§ 1. (Ky. Stat. 3952-1) *Definitions.*

(a) The term "corporation", when used in this act, includes private, *quasi* public and public corporations, an association, a joint stock association, or a business trust.

(b) The term "person", when used in this act, includes a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "utility" or "utilities", when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter own, control, operate or manage (one) any facility used or to be used for or in connection with the generation, production, transmission or distribution of electricity to or for the public for compensation for lights, heat, power or other uses; (two) any facility used or to be used for or in connection with the production, manufacture, storage distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be

used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; (four) any facility used or to be used for or in connection with the diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation; (five) any facility used or to be used for or in connection with the transmission or conveyance over wire, in the air or otherwise, of any message either by telephone or telegraph for the public for compensation; (six) any facility used or to be used for or in connection with the transportation of persons or property by street, suburban or interurban railways for the public for compensation: Provided, however, that for the purposes of this act the term "utility" or "utilities" shall not mean or include any city or town or water districts established in pursuance of Chapter one hundred thirty-nine (139).

(d) The term "facility" or "facilities", when used in this Act, shall be construed in its broadest and most inclusive sense and shall include all property, real, personal, tangible and intangible, and all other means and instrumentalities in any manner, owned, operated, leased, licensed, or used, furnished or supplied for, by, or in connection with the business of any utility.

(e) The term "rate", when used in this Act, shall mean and include the plural number as well as the singular, and every individual or joint rate, fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, fare, toll, charge or other compensation, and any schedule or tariff, or part of a schedule or tariff thereof.

(f) The term "service", when used in this Act, is used in its broadest and most inclusive sense, and includes every practice or requirement in any way re-

lating to the service of any utility, including the voltage of electricity; the heat units, the pressure of gas; the purity, pressure and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility.

(g) The term "commission", when used in this Act, shall refer to and mean the Public Service Commission of Kentucky, unless otherwise indicated.

(h) The term "commissioner", when used in this Act, shall mean one of the members of the commission.

§ 2. *Public Service Commission Created.*

(a) (Ky. Stat. 3952-2) For the purpose of regulating certain utilities and of carrying out the provisions of this act, an administrative body or commission is hereby established, to be known as the "Public Service Commission of Kentucky", which is hereby declared to be a body corporate with power to sue and be sued, and in its corporate name, as above designated, to adopt a corporate seal bearing the following inscription: "Public Service Commission of Kentucky", which seal shall be affixed to all writs and officials documents, and to such other instruments as the commission may direct. All courts shall take judicial note of said seal.

§ 3. *Officers and Employees.*

§ 4. *Powers and Duties of the Commission.*

(a) (Ky. Stat. 3952-12) *Jurisdiction.* The jurisdiction of the commission shall extend to all utilities in this commonwealth as enumerated in Section 1 of this act.

(b) (Ky. Stat. 3952-13) *General Powers of the Commission.* The commission is hereby given power to investigate all methods and practices of such utilities to require them to conform to the laws of this common-

wealth, and to all reasonable rules, regulations, and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications and schedules in effect and used by such utilities to be filed with the commission, and also other information desired by the commission relating to any investigation or requirement. Provided, however, that the commission shall have no jurisdiction over rates that are now the subject of litigation before the Railroad Commission or in any court between any utility and any municipality of the State until after the expiration of two (2) years from the entry of final order in said litigation. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, or vacated in whole or in part by order or decree of a court of competent jurisdiction.

(c) *Powers of the Commission with Respect to Rates.*

(1) (Ky. Stat. 3952-14) *Generally.* Whenever the commission after a hearing had upon reasonable notice, upon its own motion or upon complaint, as provided in Section 6 (a) of this act, finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commission shall by order require just and reasonable rates, joint rates, fares, tolls or schedules to be followed in the future in lieu of those found to be unjust,

unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act.

* * * * *

(e) (Ky. Stat. 3952-18) *Service, Equipment, Facilities to be Fixed by the Commission.* Whenever the commission, after a hearing upon reasonable notice had upon its own motion or upon complaint as provided in Section 6 (a) of this act, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any utility, or the method of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation. The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any utility, and, on proper demand and tender of rates, such utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

(f) (Ky. Stat. 3952-19) *Valuation.* The commission may on hearing, after reasonable notice, ascertain and fix the value of the whole or any part of the property of any utility in so far as the same is material to the exercise of the jurisdiction of the commission, and make revaluations from time to time and ascertain the value of all new construction, extensions, and additions to the property of such utility. In arriving at a valuation of property of any utility as provided in this Section, the commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern.

and other elements of value recognized by the law of the land for rate making purposes. Provided, the right of the commission to value and revalue the property of any utility shall not be exercised unless same is necessary or advisable to determine the legality or reasonableness of any rate, service or issuance of any security or securities, and then only after an investigation affecting same has been instituted by the commission or upon complaint or application.

* * * * *

(i) (Ky. Stat. 3952-22) *System of Accounts*. The commission may establish a system of accounts to be kept by utilities or may classify utilities and establish a system of accounts for each class and prescribe the manner in which such accounts shall be kept. Provided, the system shall as nearly as may be consistently possible conform to the Uniform System of Accounts as prescribed by the National Association of Railway and Utilities Commissioners, except that the system to be established for telephone and telegraph companies shall conform as nearly as practicable to the system adopted or approved by the Interstate Commerce Commission, or other Federal regulatory body, for the said telephone and telegraph companies.

(j) (Ky. Stat. 3952-23) *Records and Reports*. The books, accounts, papers and records of every utility shall be available to the commission for inspection and examination. If said books, accounts, papers and records are not within the state, the commission may by notice and order require the production of same or, at its option, verified copies in lieu thereof, at such time and place as it may designate, so that an examination may be made by the commission. Provided, in the latter instance any expense incurred shall be borne by the utility so ordered. Every utility, when and as required by the commission, shall file with the commission

such annual or other reports or information as the commission shall reasonably require. The commission shall prepare and distribute to such utilities blank forms for any information required under this act. All such reports shall be under oath when required by the commission.

(k) (Ky. Stat. 3952-24) *Issuance of Securities; Issuance or Guarantee of Securities by the Utility.* From and after one hundred and twenty days after the appointment and qualification of the three commissioners herein provided for, no utility shall issue any securities, notes, bonds, stocks or other evidence of indebtedness, or assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise in respect to the securities, notes, bonds, stocks or other evidence of indebtedness, of any other person or corporation unless and until, and then only to the extent that, upon application by the utility, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities, notes, bonds, stocks or other evidence of indebtedness, of any other person, or corporation, the commission, by order, authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility; (b) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service; and (c) is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify that such securities, notes, bonds, stocks or other evidence of indebtedness, or the proceeds thereof, shall be used only for the lawful purposes, as specified in the application, of such utility.

The commission shall have power by its order to grant or deny the application, provided for in the preceding paragraph hereof, as made, or to grant it in part, or deny it in part, or to grant it with such modification and upon such terms and conditions as the commission may deem necessary or appropriate in the premises.

Every application for authority for such issue or assumption shall be made in such form as the commission may prescribe. Every such application and every certificate of notification hereinbefore provided for, shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the utility.

Nothing herein shall be construed to imply any guarantee or obligation as to such securities, notes, bonds, stocks or other evidence of indebtedness, on the part of the state of Kentucky.

The provisions of this act shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at periods of not more than two years from the date thereof, and shall not apply to like notes issued by a utility, payable at a period of not more than two years from the date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time, not exceeding in the aggregate, six years from the date of the issue of the original note or notes so renewed or refunded. Nothing contained in this act shall be construed as limiting the power of any court having jurisdiction to authorize or cause receivers' certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity.

The commission may require periodical or special reports from each utility hereafter issuing any security, notes, bonds, stocks, or other evidence of indebtedness, which shall show in such detail as the commission may require, the disposition made of such securities, notes, bonds, stocks, or other evidences of indebtedness, and the application of the proceeds thereof.

Securities, notes, bonds, stocks, or other evidence of indebtedness issued, and obligations and liabilities assumed by a utility, for which, under the provisions of this act, the authorization of the commission is required, shall not be contrary to any term or condition of such order of authorization entered prior to such issuance or assumption. Securities, notes, bonds, stocks, or other evidence of indebtedness issued, or obligations or liabilities assumed, in accordance with all the terms and conditions of the order of authorization therefor, shall not be affected by a failure to comply with any provision of this act or rule or regulation of the commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. A copy of any order made and entered by the commission as provided in this act, duly certified by the secretary of the commission, approving the issuance of any securities, notes, bonds, stocks or other evidence of indebtedness, or the assumption of any obligation or liability by a utility, shall, in and of itself, be sufficient evidence for all purposes of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. Any utility which issues any such securities, notes, bonds, stocks or other evidence of indebtedness, or assumes any such obligation or liability, or makes any sale or other disposition of securities, notes, bonds, stocks or other evidence of indebtedness, or the proceeds thereof, for purposes other than

the purposes specified in the order of the commission with respect thereto, shall be liable to a penalty of not more than ten thousand (\$10,000.00) dollars, but such utility is only required to specify in general terms the purpose for which any securities, notes, bonds, stocks, or other evidence of indebtedness, are to be issued, or for which any obligation or liability is to be assumed and the order of the commission with respect thereto shall likewise be in general terms. The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties or employment, shall for the purpose of this section be deemed to be the willful act of the utility. All applications for the issuance of securities, notes, bonds, stocks or other evidence of indebtedness or assumption of liability or obligation shall be placed at the head of the commission's docket and disposed of promptly, and all such applications shall be disposed of in sixty days after the same are filed with the commission, unless it is necessary for good cause to continue the same for a longer period for consideration, whenever such application is continued beyond sixty days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. Provided, the provisions of this section shall not apply in any instance where the issuance of such securities, notes, bonds, stocks or other evidence of indebtedness are subject to the supervision or control of the Federal government or any agency thereof. However, where an application is filed or is pending before the Federal government, or any agency thereof, the commission may, in its discretion, appear as a party to the proceeding if the issuance of such securities by the Federal government or any agency thereof, will materially affect any utility over which the Commission has jurisdiction.

(1) (Ky. Stat. 3952-25) *Public Convenience and Necessity*. No utility, person or corporation shall begin the construction, of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in Section 1 of this act, except ordinary extensions of existing systems in the usual course of business, unless and until it shall have obtained from the commission a certificate that public convenience and necessity require such construction. Upon the filing of any application for such a certificate, and after a public hearing of all parties interested, the commission may, in its discretion, issue or refuse to issue, or issue in part and refuse in part, such a certificate of convenience and necessity. Unless exercised within a period not exceeding one year from the grant thereof, exclusive of any delay due to the order of any court or to failure to obtain any grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be null and void, but the beginning of any new construction or facility in good faith, within the time prescribed by the commission and the prosecution of the same with reasonable diligence, shall constitute a compliance with such certificate. Any person or group of persons may come before the commission and by petition ask that any utility be compelled to make any reasonable extensions, and the commission shall proceed to hear and determine the reasonableness of such an extension and whether the petition should be sustained either in whole or in part.

No utility shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted, the exercise of which has been voluntarily suspended or discontinued for more than one year, without first obtaining from the commission a certificate that public convenience and necessity require the exercise

of such right or privilege. Further, no utility shall, from the time this act becomes effective, apply for or obtain any franchise, license or permit from any municipality, or other governmental agency, until the commission has granted to the said utility a certificate of necessity and convenience showing that there is a demand and need for the service sought to be rendered.

All carriers or conveyors of electricity or electric power are hereby declared to be common carriers and subject to the obligations incident thereto.

* * * * *

(n) (Ky. Stat. 3952-27) *Authority of the Commission to Change Contract Rates.* The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and promulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise, between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules, or service standards, shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed, nor any contract or agreement affecting same shall be abrogated or changed until and after a hearing has been had before the commission in the manner prescribed in this act.

Nothing in this section or elsewhere, in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.

§ 5. *Duties and Privileges of Utilities, Subject to the Regulation of the Commission.*

(a) (Ky. Stat. 3952-28) *Rates.* It shall be lawful for every utility: To demand, collect and receive fair, just and reasonable prices, rates, fares, tolls, charges, or other compensation for each and every service rendered or to be rendered by it to any person or corporation.

To employ in the conduct and management of its business, suitable and reasonable classifications of its service, patrons, and rates; and such classification may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

(b) (Ky. Stat. 3952-29) *Service.* Every utility shall furnish adequate, efficient and reasonable service and may establish reasonable rules and regulations governing the conduct of its business and the conditions under which it shall be required to render service.

(c) (Ky. Stat. 3952-30) *Schedules.* Under such rules and regulations as the commission may prescribe, every utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and collected or enforced. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the commission may prescribe.

(d) (Ky. Stat. 3952-31) *Adherence to Schedule.* No utility shall directly or indirectly, by any device whatsoever or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such utility than that prescribed in the schedule, or schedules, of such utility, applicable thereto, then filed in the manner prescribed in this act; nor shall any person receive or

accept any service from any utility for a compensation greater or less than that prescribed in such schedule.

(e) (Ky. Stat. 3952-32) *Discrimination*. No utility shall as to rates or service make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. Provided, that nothing herein contained shall prevent any utility from granting free or reduced rate service to its officers, agents or employees, including physicians and attorneys, or the exchange of such free or reduced rate service between any utility and other utility for their respective officers, agents and employees, including physicians and attorneys; nor to prevent any utility from granting free or reduced rate service to the United States, or to charitable and eleemosynary institutions and persons engaged in charitable and eleemosynary work; nor to prevent any utility from granting free or reduced rate service with the object and for the purpose of providing relief in times and cases of flood, general epidemic, pestilence or other calamitous visitation. The terms "officers" and "employees" shall include furloughed, pensioned and superannuated officers and employees, and persons who have become disabled or infirm in the service of such utility. Further notice must be given the commission and its agreement obtained for such reduced rate service, except in case of an emergency in which instance the commission shall be notified at least five days after such service is rendered. No utility shall established or maintain any unreasonable difference as to rates or service either as between localities or as between classes of service for doing a like or contemporaneous service under the same or substantially the same conditions. The commission may determine any question of fact arising under this section.

§ 6. *Procedure*.

* * * * *

(d) (Ky. Stat. 3952-36) *Rehearing.* After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty days after the service of the order upon it, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such hearing on said matters. The commission shall either grant or refuse an application for rehearing within twenty days after the filing of same. Failure by the commission to act upon such application within that period shall be deemed a refusal thereof. Notice of such hearings shall be given as required with respect to original hearings. Upon such rehearings any party may offer additional evidence which could not, with reasonable diligence have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate, or affirm its former orders, and make and enter such order as it may be deemed necessary.

* * * * *

§ 7. *Court Review.*

(a) (Ky. Stat. 3952-44) Any party to a proceeding before the commission, or any utility affected by an order of the commission, may within twenty days after service upon it of the commission's order or from the time when the commission has failed to act within the period prescribed in Section 6 (d), commence an action in the circuit court for Franklin County or any other court of competent jurisdiction against the commission as defendant to vacate or set aside such order or determination on the ground that it is unlawful or unreasonable.

If a petition for rehearing has been made as provided in Section 6 (d) of this act, the right to commence an action against the commission shall be continued

for a period of twenty days from the service of the final order in such rehearing upon the party desiring to commence the action.

* * * * *

(f) (Ky. Stat. 3952-49) *Burden of Proof.* In all trials, actions or proceedings arising under the provisions of this act or growing out of the exercise of the authority or powers granted hereunto the commission, the burden of proof shall be on the party adverse to the public service commission seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful.

(g) (Ky. Stat. 3952-50) *Submission of Evidence to Circuit Court.* The case shall be heard and decided by the Circuit Court upon the evidence submitted to the Commission as shown by the transcript provided for in Subsection (e) of this Section⁷. Upon final submission the Circuit Court shall enter a decree either sustaining the order of the Commission or setting aside and vacating same in whole or in part.

(h) (Ky. Stat. 3952-51) *Appeal to the Court of Appeals.* Either party to said action, within sixty days after the entry of the order of judgment of the circuit court, may appeal to the Court of Appeals of Kentucky, and such appeal, upon the filing thereof in the office of the Clerk of the Court of Appeals, shall be docketed and advanced in similar manner as Commonwealth cases.

§ 8. *Assessment for Maintaining Commission, and How Apportioned.*

(a) (Ky. Stat. 3952-52) For the purpose of maintaining the commission hereby established, including the payment of salaries, traveling expenses, including hotel bills, printing, rent, light, heat, water, telephone, and all other overhead expenses and the expense of regu-

lation and supervision by the commission of the utilities enumerated in Section 1 of this act, said utilities shall within thirty days after the effective date of this act pay to the State Treasurer of the Commonwealth of Kentucky a sum equal to one-twentieth of one per centum of the total value that has been assessed against the property of said utilities for the year ending December 31, 1932. This fund shall be credited to the account of the commission and shall be used to defray the cost of regulation for the year following the effective date of this act.

* * * * *

(b) (Ky. Stat. 3952-53) On or before July first, 1936, and on or before July first of each year thereafter, such expense of maintaining said commission shall be apportioned among and assessed upon said utilities by the commission in proportion to the gross earnings or receipts of such utilities derived from intrastate business for the next preceding calendar year in which the assessments are made, providing, however, that the total amount so assessed shall not in any year exceed seventy-five thousand (\$75,000.00) dollars. All such fees for the maintenance of the commission shall be paid to the Treasurer of the Commonwealth of Kentucky on or before the first day of July, 1936, and on or before the first day of July of each year thereafter.

* * * * *

(h) (Ky. Stat. 3952-59) Any such utility failing to make payment as herein provided for the maintenance of said commission shall forfeit and pay to the state one thousand (\$1,000.00) dollars, and twenty-five dollars for each day such utility refuses, neglects or fails to make such payment, which forfeiture shall not release such utility from the payment of such assessment.

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§ 9. (Ky. Stat. 3952-61) *Penalties.*

Every officer, agent or employee of any utility as enumerated in Section 1 hereof, or other person who shall wilfully violate any provision of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand (\$1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal such utility shall forfeit and pay into the treasury, a sum not less than twenty-five (\$25.00) dollars, nor more than one thousand (\$1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility.

Actions to recover the principal amount due and the penalties under this Act shall be brought in the name of the Commonwealth of Kentucky in the Franklin Circuit Court. Whenever any utility is subject to a penalty under this Act, the Commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty, provided the commission may compromise such action and dismiss the same on

such terms as the court will approve. The principal amount due shall be paid into the State Treasury and credited to the Commission's account, but all penalties recovered by the Commonwealth of Kentucky in such action shall be paid into the State Treasury and credited to the general fund.

§ 10 (Not printed in Ky. Stat.) *Construction of Act.*

All laws or parts of laws in conflict with the provisions of this act are hereby repealed. Each section of this act is hereby declared to be separate and independent of every other section thereof, and, if for any reason any section or provision of this act shall be held to be unconstitutional or invalid, no other section or provision of this act shall be affected thereby, as the remaining parts of the act would have been passed by the General Assembly if such unconstitutional or invalid section or provision, if any, had been stricken out before the passage of this act by the General Assembly.
